No. 98-682

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In The

# Supreme Court of the United States

October Term, 1998

BOUCHARD TRANSPORTATION COMPANY, INC.; TSACABA SHIPPING COMPANY, INC.; MARITRANS OPERATING PARTNERS L.P., *et al.*,

*Petitioners,*

v.

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY TO BRIEFS IN OPPOSITION TO PETITION

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## QUESTIONS PRESENTED

1. Whether district courts exercising their admiralty and maritime jurisdiction should apply the procedure of Supplemental Rule F to implement the limitation of liability provisions of the Oil Pollution Act of 1990 (OPA 90).

2. If not, whether this Court will make the rules needed to fill the resulting procedural void as it did in a similar situation in *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1871).

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## REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners, BOUCHARD TRANSPORTATION CO., INC., *et al.*, submit this brief in reply to the briefs in opposition to the petition filed on behalf of:

1. The United States,[1]

2. The Florida Department of Environmental Protection ("Florida DEP"), and

3. The "Boca Ciega Claimants."

## GENERAL REPLY TO ALL THREE BRIEFS IN OPPOSITION

All opponents of the petition suggest that this case is one of merely local concern with little prejudice to be suffered by petitioners if the Court denies the petition. Quite to the contrary, as shown by the briefs of *amici curiae*, the Maritime Law Association of the United States and the American Waterways Operators, the enforcement of the Congressionally mandated regime of limitation of liability under OPA 90 is of national import. Moreover, the petitioners have been sued in state court and federal court actions by the various claimants, and these actions have been held in check only by the injunctions issued by the district court under Supplemental Rule F(3). If the decision of the Eleventh Circuit Court of Appeals is

[1] The United States filed a single brief in opposition to the petitions in cases numbered 98-682 and 98-752. This brief replies to the United States' brief only in connection with the issues raised in case number 98-682.

allowed to stand, the injunctions will be lifted, and the separate lawsuits will proceed forward. Thus, vessel owners will suffer all of the prejudice set forth in the petition, and the limitation provisions of OPA 90 will be rendered meaningless.

## SPECIFIC REPLY TO BRIEF IN OPPOSITION OF THE UNITED STATES[2]

The United States opens its brief with a discussion of the Limitation of Shipowner's Liability Act of 1851, United States' Brief at 2, and then asserts that "the owners of the three vessels filed petitions under the Limitation Act, 46 U.S.C. App. 183(a)." United States Brief at 4. In fact, the vessel owners commenced limitation proceedings in the district court under Supplemental Rule F. The owner of the bulk freighter (the Tsacaba interests) in its limitation complaint sought limitation under the Limitation Act of 1851. The owners of the tank barges (the Bouchard and Maritrans interests) in their limitation complaints sought limitation under the Limitation of 1851 Act as to those claims subject to limitation under that Act (such as collision damage to the vessels and their cargo), and also sought limitation under OPA 90

[2] The right to limitation under the Limitation Act of 1851 is not an issue brought to this Court. However, in the interest of accuracy, it should be noted that the Act has always been construed to apply to death and personal injury claims. *See Butler v. Boston Steamship Co.*, 130 U.S. 527, 552 (1889). *See also Just v. Chambers*, 312 U.S. 383, 386 (1941). The United States' assertion to the contrary is incorrect. *See* United States' brief at 2, 6.

as to claims subject to limitation under OPA 90 (such as cleanup costs and damages resulting from the impact of oil).

The district court then tailored the injunctions issued under Supplemental Rule F(3) against further proceedings against the owners of the tank barges to protect the owners' limitation rights under both the 1851 Limitation Act and OPA 90 and also to protect the claimants' rights to recover. *See* Petition App. 25.

The United States virtually ignores the indisputable fact that OPA 90 is a limitation of liability statute just as is the Limitation Act of 1851, only with different amounts of limitation and different bases for entitlement to limitation. The United States' only reference to vessel owners' limitation rights under OPA 90 is in a footnote in its brief. *See* United States' Brief at 7 n. 4. Moreover, in the footnote the United States suggests that limitation rights in this case are speculative due to "alleged violations of federal safety rules." The paramount issue brought to this Court is not whether the vessel owners will, after trial, be entitled to limitation. The problem faced by vessel owners is that in the absence of Supplemental Rule F, there is no procedure to seek limitation.

The United States suggests that petitioners may rely on "procedures generally available to litigants in the federal court system" such as consolidation under Fed. R. Civ. P. 42. As pointed out above, the vessel owners have been sued in state court and in federal court, and there is no procedure other than Supplemental Rule F to bring all claims into a single proceeding. *Concursus* of claims is accomplished by a combination of the injunction issued

under Supplemental Rule F(3), which prevents litigation against a vessel owner in any other proceeding, and the monition issued under Supplemental Rule F(4), which admonishes claimants to file their claims in the limitation case.

The United States shows no prejudice to be suffered by it as a result of vessel owners' use of Supplemental Rule F and does not rebut the assertion that Supplemental Rule F is required to protect vessel owners' limitation rights under OPA 90. The crux of the United States' argument is simply that the Eleventh Circuit was correct in this case and that the First Circuit was correct in *In re Metlife Corp.*, 132 F.3d 818 (1st Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 2367 (1998). However, both the Eleventh Circuit and the First Circuit completely ignored in their opinions vessel owners' limitation rights under OPA 90 and the requirement of a procedure to protect those rights. Regardless of the fact that the two circuit courts that have considered the issue are in accord does not make the decisions of those courts correct. Moreover, procedural rights in admiralty and maritime cases is a subject appropriate for this Court to consider as the final arbiter of admiralty and maritime law in this country, particularly when a rule of procedure is essential to giving effect to a maritime statute.

## SPECIFIC REPLY TO BRIEF IN OPPOSITION OF FLORIDA DEP

Florida DEP argues that a case of statutory construction does not possess inherent importance. Florida DEP's brief at 3. The courts below have failed to give effect to a central feature of OPA 90, the primary maritime environmental protection statute of the United States. Petitioners submit that this does have inherent importance to them, to all vessel owners, to the courts, and to all citizens of this country.

Florida DEP contends that vessel owners will not be faced with liability in excess of the amount Congress intended "unless the damages obtained for all OPA 90 claims, in all lawsuits, exceeded both the vessel owners' maximum liability *and* the $1 billion reimbursement cap for the federal Oil Spill Liability Trust Fund." Florida DEP's brief at 4. Emphasis in original. Florida DEP's contention makes no sense. Excess liability is the exact consequence of the failure of the courts below to allow the use of the *concursus* procedure of Supplemental Rule F.

Florida DEP says that "[b]y writing OPA 90 the way it did, Congress favored compensation for those damaged by oil spills over the convenience of vessel owners." Florida DEP's brief at 4. "Convenience" is not an issue. The right of vessel owners to have the benefit of the limitation provisions of OPA 90 is the issue.

## SPECIFIC REPLY TO BRIEF IN OPPOSITION OF THE BOCA CIEGA CLAIMANTS

The Boca Ciega Claimants say:

> The statute and the legislative history make crystal clear that OPA completely supersedes the Limitation Act of 1851. The vessel owners attempt to get around this incontrovertible fact by arguing that Supplemental Rule F to OPA [sic], a rule of civil procedure, creates an independent right to concursus.

Boca Ciega Claimants' brief at 3.

Throughout this litigation, petitioners have never taken the position that claims under OPA 90 are subject to the Limitation Act of 1851. Therefore, petitioners are not trying to get around anything. The Boca Ciega Claimants incorrectly characterize petitioners' position. Petitioners base their position on the necessity of *concursus* procedure to give effect to the limitation of liability provisions of OPA 90 and on the fact that Congress must have been aware that Supplemental Rule F would work quite nicely. The Boca Ciega Claimants and the courts below have completely ignored the obvious fact that vessel owners have limitation rights under OPA 90 that are worthy of protection but will not be protected in the absence of a procedure to bring all claimants into *concursus* either under Supplemental Rule F or some other rule to be fashioned by the Court.

The Boca Ciega Claimants say that a "Senate Report characterized the Limitation Act as a 'potentially devastating bar' to effective recovery of either cleanup costs or damages." Boca Ciega Claimants' Brief at 4. The report was concerned with the liability limits imposed by the

Limitation Act of 1851. As mentioned above, petitioners do not contend that claims under OPA 90 are subject to limitation under the Limitation Act of 1851. Supplemental Rule F, which was not considered in the Senate Report, does not in any way limit recovery to any extent. Supplemental Rule F is merely the procedural device that protects a vessel owner's right to the limited liability provisions of any limitation statute, be it the Limitation Act of 1851 or OPA 90. Without the use of Supplemental Rule F or some other such rule providing for a *concursus*, the substantive limitation provisions of OPA 90 cannot be given effect.

Interestingly, no respondent's opposition brief (and no court) has articulated any reason, policy or otherwise, why Supplemental Rule F should not be used in oil spill cases to protect the rights of all parties. No harm has been shown that would be suffered by any party as a result of the use of Supplemental Rule F. Contrary to the general assertions of the respondents, Supplemental Rule F provides the appropriate procedure to resolve claims while protecting vessel owners' limitation rights arising out of a maritime disaster.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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